

HOUSE BILL NO. 782

INTRODUCED BY MCNUTT, WHEAT

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT ISSUE REMARKS MUST BE FINALLY RESOLVED BEFORE ISSUANCE OF A FINAL DECREE; PROVIDING THAT THE ATTORNEY GENERAL MAY INTERVENE IN THE PROCEEDINGS BEFORE THE WATER COURT ON ISSUE REMARKS THAT HAVE NOT BEEN OTHERWISE RESOLVED; PROVIDING THAT ISSUE REMARKS ARE EVIDENCE TO BE WEIGHED AGAINST THE PRIMA FACIE STATUS OF A WATER RIGHT CLAIM; PROVIDING THAT RESOLVING OBJECTIONS IS OF HIGHER IMPORTANCE THAN RESOLVING ISSUE REMARKS UNLESS OTHERWISE DETERMINED BY THE CHIEF WATER JUDGE; ~~PROVIDING THAT RESOLVING ISSUE REMARKS AND OBJECTIONS REGARDING CLAIMS WITH AN EARLIER PRIORITY DATE IS OF HIGHER IMPORTANCE THAN RESOLVING CLAIMS WITH LATER PRIORITY UNLESS OTHERWISE DETERMINED BY THE CHIEF WATER JUDGE; TRANSFERRING MONEY FROM THE RESOURCE INDEMNITY TRUST AND PROVIDING AN APPROPRIATION TO THE ATTORNEY GENERAL FOR THE PURPOSE OF SERVING AS AN INTERVENOR IN THE STATEWIDE WATER ADJUDICATION;~~ AMENDING SECTIONS 85-2-232, 85-2-233, 85-2-234, AND 85-2-235, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Purpose. (1) Because the state of Montana is the owner of all water in the state, pursuant to Article IX, section 3, of the Montana constitution, the legislature recognizes that it is in the state's best interest to ensure that valid issues raised as a result of claims examination in the statewide adjudication of pre-July 1, 1973, water rights are resolved before a final decree is issued.

(2) If as a result of the examination or the prior verification conducted by the department an issue remark is attached to a claim, the information resulting in the issue remark and the issue remark must be weighed against the claimed water right.

NEW SECTION. Section 2. Resolution of issue remarks other than by objection. (1) In resolving issue remarks other than through the objection process provided for in 85-2-233, the water court shall proceed as provided in this section.

(2) All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.

(3) The water court shall review each factual or legal issue remark not resolved as a result of the filing of an objection to determine if information in the claim file or information obtained by ~~judicial notice~~ THE COURT provides a sufficient basis to resolve the identified issue remark or to determine if the issue remark can be corrected as a clerical error.

(4) If an issue remark cannot be resolved pursuant to subsection (3), the water court shall notify the claimant in writing that each factual or legal issue remark must be resolved as provided in this section.

(5) (a) The water court shall require the claimant to confer with the department in an informal effort to resolve any identified issue remarks.

(b) If an issue remark is resolved to the satisfaction of the department and the claimant, the claimant, with the assistance of the department, shall prepare and file any documents that are needed to support the resolution. The department shall file a separate memorandum with its recommendation regarding the disposition of any issue remarks involved in the proposed resolution.

(c) If an issue remark is not resolved, the department shall file a notice with the water court informing the water court that the issue remark was not resolved.

(6) The water court shall schedule proceedings to resolve all issue remarks that remain unresolved pursuant to subsections (2) through (5). All proceedings must include the department pursuant to 85-2-243 and any parties appearing in opposition to the claim, including the attorney general if the attorney general has intervened.

(7) (a) If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder.

(b) Except as provided in subsection (7)(a), for any claim containing an issue remark that has not been resolved pursuant to subsections (2) through (5), the attorney general may intervene as a matter of right to ~~finally resolve any issue remark that the attorney general determines may affect the accuracy of or the enforcement of a decree or that involves a legal issue.~~

(c) The attorney general may adopt rules to implement the responsibilities and duties OF THE ATTORNEY GENERAL imposed by this section.

(8) The water court shall hold an evidentiary hearing on any issue remark that remains unresolved

1 pursuant to subsections (2) through (7).

2 (9) If a claimant fails to appear at a scheduled evidentiary hearing or fails to comply with an order issued
3 by the water court in its review of issue remarks, the water court, upon motion or its own initiative, may, IN ITS

4 RULING:

5 (a) amend the elements of the claim to conform with the information in the claim file;

6 (b) amend the elements in the claim to conform with information obtained ~~through judicial notice; or BY~~

7 THE COURT;

8 (C) REMOVE THE ISSUE REMARK; OR

9 ~~(c)~~(D) terminate the claim.

10 (10) Following the conclusion of the evidentiary hearing and the expiration of any posthearing briefing
11 schedule, the water court shall render its written decision.

12 (11) Any proposal by the claimant to resolve an issue remark without an evidentiary hearing must be
13 in writing, signed by each owner of the claim at issue, and filed with the water court with any supporting
14 documentation.

15 (12) The water court's decision on each issue remark that it reviews pursuant to this section must be
16 documented in a master's report or water judge's order. The water court shall modify the abstract of each claim
17 in accordance with its written decision and remove any applicable issue remark.

18
19 NEW SECTION. Section 3. Prioritization of workload. The chief water judge may place a higher
20 priority on hearing objections ~~to the most senior claims in a basin, as well as all other objections in a basin, TO~~
21 CLAIMS IN A BASIN than on resolving issue remarks.

22
23 NEW SECTION. Section 4. Definition. For the purposes of [sections 1 through 3] "issue remark"
24 means a statement added to ~~a claim record~~ AN ABSTRACT OF WATER RIGHT IN A WATER COURT DECREE by the
25 department or the water court to identify potential factual ~~and~~ OR legal issues associated with the claim. The term
26 also includes "gray area remarks" that were the result of the verification process.

27
28 **Section 5.** Section 85-2-232, MCA, is amended to read:

29 **"85-2-232. Availability of temporary preliminary or preliminary decree.** (1) (a) The water judge shall
30 send to the department a copy of a temporary preliminary decree or preliminary decree issued for a basin.

1 (b) The water judge shall serve by mail a notice of availability of the temporary preliminary decree or
2 preliminary decree to each person who has filed a claim of existing right within the decreed basin or to that
3 person's successor as documented in the department's records.

4 (c) The water judge shall also serve by mail a notice of availability of the temporary preliminary decree
5 or preliminary decree to the purchaser under contract for deed, as defined in 70-20-115, of property in
6 connection with which a claim of existing right has been filed within the decreed basin.

7 (d) In the Powder River basin, the water judge shall serve by mail a notice of availability of the
8 temporary preliminary decree or preliminary decree to each person or to that person's successor as documented
9 in the department's records, who has filed a declaration of an existing right.

10 (e) The water judge shall enclose with a notice required under subsections (1)(b) through (1)(d) an
11 abstract of the disposition of the claimed or declared existing right of a person identified in this section or that
12 person's successor as documented in the department's records.

13 (f) The notice of availability required under this section must also be served upon:

14 (i) those issued or having applied for and not having been denied a permit to beneficially use water
15 within the decreed basin pursuant to Title 85, chapter 2, part 3;

16 (ii) those granted a reservation within the decreed basin pursuant to 85-2-316; or

17 (iii) other interested persons who request service of the notice from the water judge.

18 (g) When the water court provides notice to claimants of the opportunity to object, it shall include
19 information explaining the right to appeal a water court decision as provided in 85-2-235.

20 (2) The clerk or person designated by the water judge to mail the notice shall make a general certificate
21 of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid,
22 addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree.
23 The certificate is conclusive evidence of legal notice of entry of decree.

24 (3) Notice of the availability of a preliminary decree must also be published at least once each week
25 for 3 consecutive weeks in at least three newspapers of general circulation that cover the water division or
26 divisions in which the decreed basin is located. This notice must be provided before the final decree for the basin
27 is issued.

28 (4) A person may obtain a copy of the temporary preliminary decree or preliminary decree upon
29 payment of a fee of \$20 or the cost of printing, whichever is greater, to the water judge. The fee must be
30 deposited in the state general fund."

1
2 **Section 6.** Section 85-2-233, MCA, is amended to read:

3 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree -- procedure.**

4 (1) (a) For good cause shown and subject to the provisions of subsection (9), a hearing must be held before
5 the water judge on any objection to a temporary preliminary decree or preliminary decree by:

6 (i) the department;

7 (ii) a person named in the temporary preliminary decree or preliminary decree;

8 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or

9 (iv) any other person who claims rights to the use of water from sources in other basins that are
10 hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice
11 under 85-2-232 if the claim or claims were from sources within the decreed basin.

12 (b) For the purposes of this subsection (1), "good cause shown" means a written statement showing
13 that a person has an ownership interest in water or its use that has been affected by the decree.

14 (c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary
15 preliminary decree issued before March 28, 1997. However, a person may not raise an objection to a matter in
16 a preliminary decree if that person was a party to the matter when the matter was previously litigated and
17 resolved as the result of an objection raised in a temporary preliminary decree unless the objection is allowed
18 for any of the following reasons:

19 (i) mistake, inadvertence, surprise, or excusable neglect;

20 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move
21 for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

22 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

23 (iv) the judgment is void; or

24 (v) any other reason justifying relief from the operation of the judgment.

25 (d) After March 28, 1997, a person may not raise an objection or counterobjection to a matter contained
26 in a subsequent decree issued under this part if the matter was contained in a prior decree issued under this part
27 for which there was an objection and counterobjection period unless the objection is allowed for any of the
28 following reasons:

29 (i) mistake, inadvertence, surprise, or excusable neglect;

30 (ii) newly discovered evidence that by due diligence could not have been discovered at the close of the

1 objection period set forth in subsection (2);

2 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

3 (iv) the temporary preliminary decree is void; or

4 (v) any other reason justifying relief from the operation of the prior decree issued under this part. The
5 fact that a prior owner of a water right did not object or counterobject at a prior decree stage may not be a basis
6 for a subsequent owner of the water right to object or counterobject absent a finding that one of the provisions
7 in this subsection (1)(d) applies.

8 (2) Objections must be filed with the water judge within 180 days after entry of the temporary preliminary
9 decree or preliminary decree. The water judge may, for good cause shown, extend this time limit up to two
10 additional 90-day periods if application for an extension is made prior to expiration of the original 180-day period
11 or any extension of it.

12 (3) Upon expiration of the time for filing objections under subsection (2), the water judge shall notify
13 each party whose claim received an objection that an objection was filed. The notice must set forth the name
14 of each objector and must allow an additional 60 days for the party whose claim received an objection to file a
15 counterobjection to the claim or claims of the objector. Counterobjections must be limited to those claims that
16 are included within the particular decree issued by the court.

17 (4) Objections and counterobjections must specify the paragraphs and pages containing the findings
18 and conclusions to which objection is made. The request must state the specific grounds and evidence on which
19 the objections are based.

20 (5) (a) Upon expiration of the time for filing counterobjections under subsection (3), the water judge shall
21 notify each party named in the temporary preliminary decree or preliminary decree or that person's successor
22 as documented in the department records and shall notify the attorney general that objections and
23 counterobjections have been filed. The water judge shall fix a day when all parties who wish to participate in
24 future proceedings are required to appear or file a statement. The water judge shall then set a date for a hearing.
25 The water judge may conduct individual or consolidated hearings. A hearing must be conducted in the same
26 manner as for other civil actions. At the order of the water judge, a hearing may be conducted by the water
27 master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

28 (b) In conducting hearings pursuant to this chapter, a water judge may require the parties to participate
29 in settlement conferences or may assign the matter to a mediator. Any settlement reached by the parties is
30 subject to review and approval by a water judge.

(6) After the issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice. The water judge may order any additional notice of the motion as the water judge considers necessary. The costs of the notice required pursuant to this subsection must be borne by the moving party.

(7) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(8) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact is permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall issue a new preliminary decree in accordance with 85-2-231. However, any party to a compact declared void may appeal from that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal stays the period for filing a statement of claim as required under this subsection.

(9) Upon petition by a claimant, the water court may grant a motion for dismissal to an objection to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was previously decreed and if dismissal is consistent with common-law principles of issue and claim preclusion.

(10) The provisions of subsection (9) do not apply to issues arising after entry of the previous decree, including but not limited to the issues of abandonment, expansion of the water right, and reasonable diligence.

(11) (a) All issue remarks, as defined in [section 4], must be finally resolved before the issuance of a final decree.

Section 7. Section 85-2-234, MCA, is amended to read:

"85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree, ~~and on the basis of any hearing that may have been held, and on final resolution of all issue remarks, as defined in [section 4],~~ enter a final decree affirming or modifying the preliminary decree. ~~If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.~~

(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree

1 without alteration unless an objection is sustained pursuant to 85-2-233; provided that the court may not alter
2 or amend any of the terms of a compact except with the prior written consent of the parties in accordance with
3 applicable law.

4 (3) The final decree must establish the existing rights and priorities within the water judge's jurisdiction
5 of persons who have filed a claim in accordance with 85-2-221, of persons required to file a declaration of
6 existing rights in the Powder River basin pursuant to an order of the department or a district court issued under
7 sections 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe possessing water rights
8 arising under federal law, required by 85-2-702 to file claims.

9 (4) The final decree must establish, in a form determined to be appropriate by the water judge, one or
10 more tabulations or lists of all water rights and their relative priorities.

11 (5) The final decree must state the findings of fact, along with any conclusions of law, upon which the
12 existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

13 (6) For each person who is found to have an existing right arising under the laws of the state of
14 Montana, the final decree must state:

15 (a) the name and post-office address of the owner of the right;

16 (b) the amount of water included in the right, as follows:

17 (i) by flow rate for direct flow rights, such as irrigation rights;

18 (ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not
19 susceptible to measurement by flow rate; or

20 (iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate
21 to adequately administer the right;

22 (c) the date of priority of the right;

23 (d) the purpose for which the water included in the right is used;

24 (e) the place of use and a description of the land, if any, to which the right is appurtenant;

25 (f) the source of the water included in the right;

26 (g) the place and means of diversion;

27 (h) the inclusive dates during which the water is used each year;

28 (i) any other information necessary to fully define the nature and extent of the right.

29 (7) For each person, tribe, or federal agency possessing water rights arising under the laws of the
30 United States, the final decree must state:

(a) the name and mailing address of the holder of the right;
(b) the source or sources of water included in the right;
(c) the quantity of water included in the right;
(d) the date of priority of the right;
(e) the purpose for which the water included in the right is currently used, if at all;
(f) the place of use and a description of the land, if any, to which the right is appurtenant;
(g) the place and means of diversion, if any; and
(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702.

(8) Clerical mistakes in a final decree may be corrected at any time on the initiative of the water judge or on the petition of any person who possesses a water right. The water judge shall order the notice of a correction proceeding as he determines to be appropriate to advise all persons who may be affected by the correction. An order of the water judge making or denying a clerical correction is subject to appellate review."

Section 8. Section 85-2-235, MCA, is amended to read:

"85-2-235. Appeals. (1) A person whose existing rights and priorities are determined in a final decree may appeal the determination only if:

(a) the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; ~~or~~

(b) the person's rights or priorities as determined in the temporary preliminary decree or the preliminary decree were affected as the result of an objection filed by another person;

(c) the person requested a hearing and appeared before the water court to finally resolve an issue
remark, as defined in [section 4]; or

(d) the person is a claimant appealing an adverse decision when the water court issued the decision
as the result of an evidentiary hearing or as the result of calling the claim in on the court's own motion.

(2) The attorney general may appeal a determination made in a final decree if the attorney general
participated as an intervenor as provided in [section 2].

~~(2)(3)~~ (3) An interlocutory ruling by the water judge upon a question of law may be appealed by any party who is affected by the decision and who participated in the matter in which the ruling was issued."

~~NEW SECTION. Section 9. Appropriation — FUND TRANSFER. The following money (1) THERE is appropriated from the general fund AVAILABLE PRINCIPAL OF THE RESOURCE INDEMNITY TRUST FOR FISCAL YEARS 2006 AND 2007 \$49,000 WATER RIGHT APPROPRIATION ACCOUNT PROVIDED FOR IN 85-2-318, \$98,000 FOR THE BIENNIUM BEGINNING JULY 1, 2005, to the attorney general to fund additional staff for the purpose of serving as an intervenor on behalf of the state in the statewide water adjudication;:~~

~~(2) THERE IS TRANSFERRED \$98,000 FROM THE PRINCIPAL OF THE RESOURCE INDEMNITY TRUST IN EXCESS OF \$100 MILLION TO THE WATER RIGHT APPROPRIATION ACCOUNT PROVIDED FOR IN 85-2-318 FOR THE PURPOSES PROVIDED IN SUBSECTION (1);:~~

Fiscal year 2006	\$98,000
Fiscal year 2007	\$98,000

NEW SECTION. Section 9. Codification instruction. [Sections 1 through 4] are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply to [sections 1 through 4].

COORDINATION SECTION. Section 10. Coordination instruction. If House Bill No. 22 is not passed and approved, [this act] is void.

NEW SECTION. Section 11. Effective date. [This act] is effective on passage and approval.

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